DOCUMENT RESUME

ED 438 609 EA 030 248

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TITLE Religion and the Schools: Emerging Issues.
INSTITUTION National School Boards Association, Alexandria, VA. Council of School Attorneys.
PUB DATE 1999-11-00
NOTE 18p.; Published bimonthly. This article is a summarized version of a presentation given at the NSBA Council of School Attorneys' "School Law Retreat" (Charleston, SC, October 15-16, 1999).
AVAILABLE FROM NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, VA 22314 ($80/6 issues). Tel: 703-838-6722; Web site: http://www.nsba.org/cosa.
PUB TYPE Collected Works - Serials (022) -- Information Analyses (070)
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Compliance (Legal); *Court Litigation; Creationism; Elementary Secondary Education; *Federal Regulation; *Government School Relationship; Racially Balanced Schools; Religion; *School Prayer; *State Church Separation

ABSTRACT

This publication offers a brief review of religion and school issues that emerged in U.S. courts in 1999. Included are prayer in public schools; teacher's free exercise rights limited by establishment clause; impermissible student lessons and activities; teaching of evolution/creation science; volunteer clergy counselors in the schools; aid to parochial schools; vouchers; a special publicly funded school district for religious sect; and the use of school facilities for religious purposes by outside groups. Case notes are also provided for: religion; Eleventh Amendment; race-based admissions; Fourth Amendment; the Americans with Disabilities Act; employment, and Section 1983. The article ends by reviewing cases recently brought before the Supreme Court. (DFR)

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ED 438 609

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Inquiry & Analysis

The Bimonthly Publication of the NSBA Council of School Attorneys

Religion and the Schools- Emerging Issues

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Religion and the Schools- Emerging Issues

JAY WORONA*
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INTRODUCTION

Few issues engender more heated discussion and debate than topics related to governmental support and/or involvement in religion. When public education is added to the fray, the issues become even more heated. This past year, in light of tragic outbreaks of school violence, many public officials claimed that the absence of religion in public schools greatly contributed to the violent propensities of certain students. Others claimed that the United States Supreme Court has made it quite clear that governmental endorsement of religion has no place in public schools. Whatever the perspective one has on this most controversial subject, clearly these issues will be litigated for some time to come. Below is a brief review of some of the issues that emerged in courts over the past year.

PRAYER IN PUBLIC SCHOOLS

The United States Supreme Court has ruled repeatedly that the separation of church and state principles embodied in the Establishment Clause of the First Amendment prohibit school-sponsored prayers and religious exercises, even when the prayer is nondenominational and participation is voluntary.

Benedictions and Invocations

One of the most intense conflicts involving religion in public schools is whether student-initiated and student-led prayer during public school graduation ceremonies is constitutionally permissible. The Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992), held that benedictions and invocations by a member of the clergy at a public school graduation ceremony violated the Establishment Clause of the First Amendment, despite the fact that students were not compelled to attend graduation ceremonies. Of particular importance to the Court was that a graduation ceremony is an important event in a student's life and that there was a danger of coercion over non-believing students or at least the communication that the school district was endorsing religion.

Current proponents of prayer in public school graduation ceremonies have argued, successfully in some instances, that *Lee* merely prohibits invocations and benedictions by a member of the clergy at graduation ceremonies but not student-initiated benedictions and invocations. This past year school prayer issues continued to be litigated. In *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999), *cert. granted*, Nov. 15, 1999, the United States Court of Appeals for the Fifth Circuit held unconstitutional a public school prayer policy that permitted sectarian, proselytizing benedictions and invocations at high school graduation ceremonies, despite the fact that the prayer would be initiated and delivered by students.

In this case, a Texas public school district allowed students to read Christian prayers during high school graduation ceremonies. A number of students and their parents sued the district, claiming that the district's policies and practices violated the Establishment Clause. The school district claimed that whether or not the prayer was nonsectarian or non-proselytizing was irrelevant to Establishment Clause analysis, as long as the prayers were student-initiated and student-delivered. The district also argued that it had no choice but to allow sectarian, proselytizing prayer, because it had created a limited public forum in its graduation exercises.

The federal district court cautioned the school district not to play any role in selecting students or in reviewing or approving the content of their invocations and benedictions. However, the court "went on to note that 'generic prayers to the 'Almighty' or to 'God', or to 'Our Heavenly Father (or Mother)'" were acceptable, and that "[r]eference to any particular deity, by name, such as Mohammed, Jesus, Buddha, or the like, will likewise be permitted, as long as the general thrust of the prayer is nonproselytizing. . ."

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* The author extends special thanks to John Miller, Associate Counsel at NYSSBA for his assistance. This article is a summarized version of a presentation given at the NSBA Council of School Attorneys' "School Law Retreat," in Charleston, South Carolina, Oct. 15-16, 1999. To purchase the seminar materials, please call 1-800-706-6722 and request order #06-172-3.

EA030848

INQUIRY & ANALYSIS is a bi-monthly publication of the NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314, (703) 838-6722. Naomi E. Gittins, Staff Attorney and Editor; James T. Maatsch, Council Chairman; Mary Ellen Maxwell, NSBA President; Anne L. Bryant, NSBA Executive Director; Julie Underwood, General Counsel; Edwin C. Darden, Staff Attorney; Julie Lewis, Staff Attorney; Susan R. Butler, Director; Lyndsay Andrews, Legal Services Manager; Thomas W. Burns, Legal Assistant; Edward Faiello, Legal Information Assistant; and Sheila Baehre, Legal Services Assistant. *I&A* is a membership service of the Council or can be purchased by subscription for $80/6 issues. For more school law information, visit the Council's Web site at http://www.nsba.org/cosa/. Copyright © 1999 by the National School Boards Association. All Rights Reserved.

Observing that in *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), the Fifth Circuit found graduation prayer constitutional because it has the secular purpose of "solemnizing" the occasion of graduation, a three-judge panel in this case found that once such prayer becomes sectarian or proselytizing, the secular purpose of solemnizing the occasion is transgressed. In addition, the panel flatly rejected the school district's contention that it had created a limited public forum in its graduation exercises, such that it could not prohibit student-initiated, student-delivered, sectarian, proselytizing prayer. According to the panel: "The limited number of speakers, the monolithically non-controversial nature of graduation ceremonies, and the tightly restricted and highly controlled form of 'speech' involved, all militate against labeling such ceremonies as public fora of any type." Finally, the panel ruled that the district court erred in defining nonsectarian prayer to include reference to specific deities. In the words of the court, "[a] nonsectarian, nonproselytizing prayer that, for example, invokes the name of Buddha or Mohammed or Jesus or Jehovah is an obvious oxymoron."

Also this year in *Adler v. Duval County School Bd.*, 174 F.3d 1236 (11th Cir. 1999); *rehearing en banc granted*, June 3, 1999, a three judge panel declared unconstitutional a Florida school district policy that allowed graduating seniors to vote on whether to permit unrestricted student led messages at the beginning and closing of graduation ceremonies.

Until 1993, the public schools in Duval County allowed formal prayers at graduation ceremonies to be conducted by religious officials. After the Supreme Court's ruling in *Lee v. Weisman*, the practice was discontinued. Thereafter, the school district allowed the graduating class to elect a volunteer to deliver an opening and closing message at graduation. The message was not subject to monitoring or review by school officials.

Finding the practice unconstitutional, the Eleventh Circuit panel wrote: "[T]he delegation of the decision regarding a 'prayer' or 'message' to the vote of graduating students does not erase the imprint of the state from graduation prayer." Critical to the court's reasoning was that graduation exercises remained a school sponsored event, over which the district retained considerable control. The Eleventh Circuit recently vacated the panel decision and will hear the case *en banc*.

Finally, in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), the Alabama State legislature enacted a law allowing non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations, or benedictions at school and during school events. The district court struck down the statute as unconstitutional and issued an injunction prohibiting "all prayer or other devotional speech in situations which are not purely private" and requiring teachers to forbid students from participating in public prayer, other devotional speech or Bible reading while in school or at school events.

The Eleventh Circuit held that the suppression of genuinely student-initiated religious speech was not necessary to achieve neutrality towards religion, and the district court went too far in forbidding all such speech. So long as school personnel did not participate or actively supervise it, student-initiated religious speech should be permitted. However, the appellate court ruled, the school could place the same reasonable time, place and manner restrictions on student religious speech as it applies to secular speech.

Prayer at School Sporting Events

Various courts across the country have uniformly prohibited school-sponsored prayer at school games, including prayer in locker rooms and on the playing field, during practice, and prior to and after sporting events. The deciding factor against prayer at sporting events has been that they are school sponsored and controlled activities.

This past year the issue arose in *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999), *cert. granted*, Nov. 15, 1999, in which the Fifth Circuit held that even though student-initiated, student-delivered, nonsectarian, non-proselytizing, prayer at graduation ceremonies is constitutional, prayer of exactly the same type at high school football games violates the Constitution. The case arose under circumstances in which the school district was directed by a federal district court judge to "finalize a unified 1st Amendment religion/expression policy." In response, the school district adopted, for the first time, a written policy permitting invocations at football games, subject to the same rules applied to prayer at high school graduation ceremonies. The Fifth Circuit panel ruled it was unconstitutional for the school district to extend its policy on graduation prayer to football games, because a football game simply is not the type of activity that warrants the solemnity of prayer, even a nonsectarian, non-proselytizing prayer. The Supreme Court has accepted this case for oral argument.

Prayer at School Board Meetings

The Sixth Circuit recently addressed the issue of prayer at school board meetings. In *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), a former student and a teacher sued the board of education and the superintendent, claiming that the board's practice of opening its meetings with prayer or a moment of silence was unconstitutional. Although the school district prevailed in federal district court, the Sixth Circuit disagreed, ruling that the practice violated the Establishment Clause.

In 1992, the new president of the board expressed concerns about "strife and acrimony" at board meetings and suggested that an opening prayer would lead to a "more businesslike and professional decorum." Thereafter the board's meetings were opened with prayer offered by a member of the religious community chosen by the board president, a moment of silent prayer, or prayer led by the school board president. Most of the prayers contained religious overtones, but some were secular in nature. In 1996, a member of the clergy was elected president of the board and thereafter he personally offered the prayer or requested a moment of silence to open board meetings.

The former student who sued the district had attended a meeting at the request of the board to receive an award. The plaintiff teacher regularly attended board meetings at which he routinely expressed disapproval of the opening prayer. The teacher indicated that he had no choice but to be present during the prayer because he had to arrive early to get a seat.

According to the Sixth Circuit, "[p]rayers at meetings of the school board do not fit neatly within the category of "school-sponsored prayer" as defined in *Lee*, because the prayers in this case are not said in front of the student body as a whole. By the same token, the practice challenged in this

case does not neatly fall under the unique and narrow exception articulated in *Marsh [v. Chambers*, 463 U.S. 783 (1983)], because the school board is an integral part of the public school system." Because the court concluded that school board meetings are an integral part of the public school system, it ruled that a school board is not the type of "deliberative public body" that the U.S. Supreme Court had in mind in *Marsh*. In reaching this conclusion, the court observed: (1) students regularly attend and actively participate in the discussions; (2) a student representative sits on the school board; (3) the board regularly presents honors and awards to students at its meetings; and (4) students who wish to challenge suspensions or expulsions must do so at board meetings.

The court concluded: "School board meetings are therefore not the equivalent of galleries in a legislature where spectators are incidental to the work of the public body; students are directly involved in the discussion and debate at school board meetings." Moreover, according to the court, the school board setting is arguably more coercive to participating students than the graduation ceremony at issue in *Lee*. While a student can forego attendance at the graduation ceremony and still get a diploma, a student must attend a school board meeting to challenge a suspension or expulsion.

TEACHER'S FREE EXERCISE RIGHTS LIMITED BY ESTABLISHMENT CLAUSE

As a general rule, teachers, as agents of the school districts in which they are employed may not utilize their positions of public service to proselytize students. Schools districts may in fact be subjected to Establishment Clause litigation by students who claim that their teachers have been permitted to engage in such practices by their school district employer. Teachers and school employees may however claim that their own individual Free Exercise Clause rights have been violated as a result of their being precluded from sharing their personally held religious beliefs with their students.

This past year, in *Marchi v. Board of Cooperative Educational Services (BOCES) of Albany, Schoharie, Schenectady and Saratoga Counties*, 173 F.3d 469 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 169 (1999), a Christian teacher shared his conversion experience with his students and discussed such matters as "forgiveness, reconciliation, and God" as part of his instructional program. The BOCES that employed him directed him to stop using "references to religion in the delivery of [his] instructional program unless it is a required element of a course of instruction...and has prior approval by [his] supervisor..." He refused, stating that compliance "'would be detrimental to his students' and 'violate his conscience before God.'" The BOCES charged him with insubordination and suspended him for six-months after a disciplinary proceeding. His return to teaching was conditioned on his agreement to comply with the directive.

Upon his return, he received an audiotape of religious music entitled "Wee2 Sing the Bible" from the father of one of his students, with a note that the music calmed the student. The teacher wrote back: "I thank you and the LORD for the tape[;] it brings the Spirit of Peace to the classroom...May God Bless you all richly!" BOCES did not take action against the teacher for this incident, but advised him that the directive precluded this type of communication. Although the teacher later admitted he had used the tape during class, he sued the BOCES, claiming the earlier suspension violated his free exercise rights and that the directive was unconstitutionally vague.

Upholding the constitutionality of the directive, the Second Circuit noted that a school risks violating the Establishment Clause "if any of its teachers' activities gives the impression that the school endorses religion." Therefore, according to the court, in order to avoid such a violation, a school may prohibit religious expressions by teachers and in teacher-parent interactions which "risk giving the impression" that the district endorses religion. The court found the directive, together with the guidance the teacher had been given by BOCES administrators, provided the teacher with sufficient notice of the prohibited conduct.

IMPERMISSIBLE STUDENT LESSONS AND ACTIVITIES

When faced with parental challenges to materials they view as religiously objectionable, most courts have protected the discretion of the local school board to make curriculum-related decisions. *See, e.g., Virgil v. School Board of Columbia County*, 862 F.2d 1517 (11th Cir. 1989). In such decisions, the courts reasoned that school districts could simply not provide an effective educational program if parents were permitted to have their children opt out of core-parts of the curriculum or if books were removed from the children's use.

This past year, an interesting variation on this theme was litigated in *Altman v. Bedford Central School District*, 45 F.Supp.2d 368 (S.D.N.Y. 1999). In this case, some Catholic parents claimed that the public school district employed a program which endorsed "Satanism, occultism, pagan religions and a New Age Spirituality" in violation of the free exercise of their beliefs. The court rejected the claim that the school district was responsible for the activities complained of by the parents, finding instead that these activities were "random acts initiated by individual teachers luxuriating in their academic freedom." However, the court did find that certain of the activities violated the rights of the students and their parents under the First Amendment. The activities found to violate the Establishment Clause included the following:

Hindu God — Story and Paper Image

During a third grade class about the culture of India , the children heard a story about a Hindu god. The teacher's lesson plans called for the students to construct a paper image of the god (although they never actually did so, due to time constraints). The court found that while reading the story neither advanced nor promoted the Hindu religion, having young students construct a "graven" paper image of "a known religious god" would constitute subtle coercive pressure that violates the Establishment Clause.

"Worry Dolls"

Fourth grade students made small, brightly colored dolls known as "Worry Dolls," which were sold in the school store. The parents claimed their children were told that if they put the worry dolls under their pillows at night, the dolls would "chase away [their] bad dreams." The court found that district sponsorship of the Worry Dolls violated the First Amendment by endorsing superstition over religion.

Earth Day Celebration

The parents also challenged an "Earth Day" celebration in which high school students presented symbolic gifts to the earth, in front of altar-like structures, while drums played. There were numerous references to "Mother Earth" and "Father Sun" during the celebration, and prayers by the Winnebago and Taos Indians were read. According to the court, the earth was "deified" by these practices, and the celebrations were a "clear example of a religious teaching" which violated the First Amendment.

The court ordered the district to discontinue these practices and to adopt a policy which ensures the district "shall remain neutral towards all religions, neither sponsoring nor disparaging any religious belief, and shall not coerce any student to participate in religion or its exercise or to violate any religious precept held by a child or his or her parents."

TEACHING OF EVOLUTION/CREATION SCIENCE

In *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999), the Fifth Circuit ruled that a district's requirement that a disclaimer be read before the teaching of evolution in elementary and secondary school classes violated the Establishment Clause because the primary purpose and effect of the disclaimer was to protect and maintain a particular religious viewpoint. Specifically, the disclaimer read: "It is hereby recognized by the . . . board of education that the lesson to be presented regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation. . . It is the basic right of each student to form his/her own opinion and maintain beliefs taught by parents. . . Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." The board argued its purpose was to encourage critical thinking and the benefit to religion was incidental to that purpose. The court found that the primary effect of this disclaimer being read by teachers was to maintain belief in the Biblical version of creation, and went far beyond a merely incidental benefit to religion.

VOLUNTEER CLERGY COUNSELORS IN THE SCHOOLS

In *Doe v. Beaumont Independent School Dist.*, 173 F.3d 274 (5th Cir. 1999), *rehearing en banc granted*, June 21,1999, the Fifth Circuit of the United States Court of Appeals recently invalidated, a program known as the "Clergy in Schools" volunteer counseling program. Under the program, the school district recruited volunteers exclusively from among the local clergy to provide counseling to students in school, during school hours. The district explained that it recruited from among clergy members because of their special listening and communication skills. The majority of clergy recruited by the district were Protestant Christians. During the school day, school officials removed selected students from class without parental consent or notification and brought them together in another classroom to participate in group counseling. The school district provided written guidelines to the clergy members, instructing them **not** to: (1) discuss religion; (2) quote religious materials; (3) provide information about church services; (4) identify their church affiliation; or (5) wear clothing that would reveal their religious affiliation. In addition, the clergy were told to focus on discussing civic values with students and to refrain from discussing sex and abortion. Moreover, the clergy were told not to pray with students.

According to the court, however, these limitations on the activities of the clergy volunteers did not save the program from its constitutional defects. In the words of the court, the school district's:

> creation of a special program that recruits only clergymen to render volunteer counseling makes a clear statement that it favors religion over nonreligion, at least in the context of those deemed suitable to participate in student counseling in matters of morality and virtue. [The district] fails to include lay professionals, who are arguably well qualified to mentor students in this regard. In short, notwithstanding [the district's] assertion to the contrary, [it] does not select its volunteer counselors based on neutral criteria — such as listening or communication skills — but rather on the very fact that they are religious representatives . . . although in a vacuum student counseling is not an inherently religious undertaking, when the practice under scrutiny consists of a group of counselors made up entirely of clergymen addressing a captive audience of primary and secondary public school students — at school, during school hours, under the aegis of school administrators — concerning morals and virtue, the exercise loses its secular character entirely.

AID TO PAROCHIAL SCHOOLS

The United States Supreme Court consistently has ruled that while it is constitutionally permissible to provide certain publicly funded materials and services to parochial school students, it is constitutionally impermissible to provide such publicly funded materials and services to parochial schools directly. The Court will further define the parameters of permissible aid in *Helms v. Picard*, 151 F.3d 347 (5th Cir.1999), *cert. granted*, *Mitchell v. Helms*, 119 S.Ct. 2336 (1999). The Court in this case will review a decision by the Fifth Circuit Court of Appeals declaring unconstitutional the use of federal block grant monies by the Jefferson Parish School Board in Louisiana to purchase and loan to sectarian schools library books and instructional equipment, including, for example: filmstrip projectors, overhead projectors, television sets, video cassette recorders, video camcorders, computers, printers, phonographs, and slide projectors. In reaching its decision the Fifth Circuit expressed concern that the materials loaned to the religious schools would be used to augment the religious instruction of students, in violation of the Establishment Clause.

The appellate court's ruling came in response to a taxpayer challenge to the school district's practice of using federal funds obtained under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 to purchase and loan these items to parochial schools. According to the Fifth Circuit, it was constrained by the limitations of the Supreme Court's prior holdings in *Meek* and *Wolman*. The court noted that in *Agostini v. Felton*, the Supreme Court

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discarded the premise from *Meek* that "substantial aid to the educational function of sectarian schools necessarily results in aid to the sectarian school enterprise as a whole" but did not overrule *Meek*. Therefore, the Fifth Circuit found *Meek* to be controlling.

A similar issue arose in *Freedom from Religion Foundation v. Bugher*, 1999 WL 500025 (W.D. Wis. 1999), in which a district court in Wisconsin ruled that indirect subsidies to private schools for technology computer links did not violate the Establishment Clause. The program funded by mandatory contributions from telecommunications providers, provided data and video links at discounted rates to participating school districts, private schools, cooperative educational service organizations, colleges and public libraries. The links were sometimes used by the sectarian schools to transmit religious information. The court distinguished this case from *Meek* and *Wolman* because the schools here paid the state, albeit at a reduced rate, for a benefit not essential to the operation of the school and the subsidy provided did not free up resources the school would have otherwise spent to advance its religious purpose. The court ruled that the computer links were analogous to the sign-language interpreter services provided in the *Zobrest* case, and were a "mere conduit" neutrally provided to a broad class, and not just for the benefit of secular schools. According to the court, the program had the secular purpose of enhancing the educational opportunities of all students and any benefit to religious schools was indirect and insubstantial.

VOUCHERS

The issue of vouchers reached the Supreme Court last year in *Jackson v. Benson*, 221 Wis.2d 658, 588 N.W.2d 635(1998), *cert. denied*, 119 S. Ct. 466 (1998), but the Court refused to hear this appeal from a decision of Wisconsin's highest court validating a law that permits students in the Milwaukee school district to use state-funded tuition vouchers for attendance at both sectarian and nonsectarian private schools. Although the Supreme Court's refusal to hear an appeal from the state court decision does not signify endorsement or approval of the Wisconsin program, as a practical matter, the Court's inaction leaves Wisconsin's voucher program intact.

The Court again signaled its hesitation to tackle the issue by leaving intact a decision by the Arizona Supreme Court in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 120 S. Ct. ____ (1999). The Arizona Supreme Court had held that the state law that provides dollar for dollar tax credits for donations made to organizations that make grants for tuition to private schools, most of which are sectarian, does not violate the Establishment Clause.

SPECIAL PUBLICLY FUNDED SCHOOL DISTRICT FOR RELIGIOUS SECT

In *Grumet v. Pataki*, 93 N.Y.2d 677 (N.Y. 1999), *cert. denied*, 120 S. Ct. 363 (1999), the Supreme Court declined review of a decision by the New York Court of Appeals which had struck down as unconstitutional a law enacted by the State of New York to enable the Village of Kiryas Joel to reestablish its own publicly funded school district for a third time. The United States Supreme Court had issued a temporary stay of the judgment of the New York Court of Appeals. 119 S. Ct. 2364 (1999). With the denial of review the decision of the New York Court of Appeals became effective, but during its 1999 session, the New York State Legislature circumvented the court's ruling by adopting legislation which permits the Kiryas Joel school district to become reconstituted for the fourth time.

USE OF SCHOOL FACILITIES FOR RELIGIOUS PURPOSES BY OUTSIDE GROUPS

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Supreme Court held that a school district could not discriminate on the basis of viewpoint by permitting school property to be used for the presentation of all views concerning family issues and child rearing except those dealing with the subject matter from a religious standpoint. In more recent times, litigation has been commenced by outside religious groups who have claimed that certain school districts unconstitutionally precluded them from district facilities for the purpose of holding religious services or religious instruction. In such cases, the school districts have claimed that such usage was not consistent with the Supreme Court's *Lambs Chapel* decision which requires them to permit outside groups access to school facilities to express religious viewpoints when other groups are permitted such access but does not require that such access be granted for purely religious purposes such as holding worship services or the offering of religious instruction.

In *Full Gospel Tabernacle v. Community School District No. 27*, 164 F.3d 829 (2d Cir. 1999), *cert. denied*, 119 S. Ct. 2395 (1999), the Second Circuit ruled that a school district could refuse to rent its facilities to a church for religious worship services on the grounds that both state law and the school district's own policies and regulations prohibited such use. The issues in this case mirrored those in *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 1517 (1998), except that the district here had previously granted access to school facilities to other churches for religious worship services and instruction. The district did not deny that such access had been permitted, but argued that permission had been granted erroneously by an employee in the department responsible for reviewing such requests at a time when the department head position was vacant. The court ruled that while past practice is a relevant factor in determining if a district has opened its limited forum to religious worship, it is not determinative when a district mistakenly grants access to its facilities for religious worship and instruction. The United States Supreme Court denied Full Gospel's petition for writ of *certiorari* on June 24, 1999.

By contrast in *Liberty Christian Center, Inc. v. Board of Educ. of the City School District of the City of Watertown*, 8 F. Supp.2d 176 (N.D.N.Y. 1998), the federal district court for the Northern District of New York ruled that the Watertown City School District violated the constitutional rights of members of a religious group when the district denied them use of the school cafeteria for religious worship. The district argued that state law does not permit school buildings and grounds to be used for religious worship. However, evidence was presented that the district's facilities had been used in the past for religious worship, albeit without the district's prior approval. According to the court, the district was chargeable with the knowledge that its facilities had been used for religious worship in the past, and therefore, it could not discriminate against another group that wanted to use the facilities for the same purpose. The court suggested that the district could prevent use of its facilities for

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religious worship and instruction by adopting a written policy prohibiting any group or organization from using school buildings and grounds for such purposes.

After the above case was decided, the Watertown City School District amended its policy to specifically prohibit use of school facilities for religious purposes. Thereafter, the Liberty Christian Center submitted an application to use school facilities to hold a "Christian Concert." After inquiring about the specific activities that would occur at the concert, the school district denied the application, on grounds that Liberty Christian intended to use school facilities for religious purposes in violation of the district's amended policy. This prompted yet another lawsuit against the district by Liberty Christian. The case was heard in federal district court on July 9, 1999.

Case Notes

RELIGION

Teacher's refusal to allow elementary school student to read Bible story to classmates in a classroom setting did not violate either the student's free speech rights or the Establishment Clause because classroom was a non-public forum and teacher's decision was reasonably related to a legitimate pedagogical concern. School officials' temporary removal of student's picture of Jesus from display in classroom did not violate student's free speech rights or the Establishment Clause because artwork assignment also involved a non-public forum related to school's curriculum and officials' decision was reasonably related to a legitimate pedagogical concern.

C.H. v. State of New Jersey Department of Education, No. 98-5061 (3rd Cir. Oct.22, 1999)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=3rd&navby=case&no=992308P

Elementary school student was involved in two incidents related to class assignments that contained religious material. The first incident occurred when the student's kindergarten teacher instructed the students to make a Thanksgiving poster depicting what they were "thankful for." The student drew a picture depicting Jesus. The posters were hung on the wall outside the classroom. While the teacher was absent from school, members of the school board removed the student's poster because of its religious theme. When the teacher returned, she placed it back on the hallway wall. The second incident occurred in the student's first grade class. As a reward for achieving their reading assignments, the first grade teacher allowed the students to bring a book from home to read to the class. The only condition placed on the privilege was that the teacher would review the books to ensure that their length and complexity were appropriate for the class. The student brought in a book containing Bible stories. The teacher would not allow the student to read from his book to the class because of the religious content. When the student's mother learned that he was prevented from reading from his book, she complained to the school administration without success. The mother then filed suit against the school board and various school officials. She contended that the actions taken by defendants in regard to the two incidents violated both the student's right to freedom of expression and the Establishment Clause. The district court granted the defendants' motion for judgment on the pleadings and dismissed the complaint.

A Third Circuit panel affirmed. The panel's opinion began by examining the mother's freedom of expression claim, based on *Rosenberger* and *Lamb's Chapel*, that the teacher's refusal to allow her son to read his Bible story was a content based restriction that favored secular expression over religious expression in violation of the First Amendment. While the panel agreed that students retain their constitutional rights even in a school setting, it observed that those rights were subject to the supervision and control necessary for schools to carry out their educational mission. Based on this principle, it noted that courts are prohibited from intervening to resolve conflicts that arise in the daily operation of schools which "do not directly and sharply implicate basic constitutional values." Relying on *Hazelwood*, the panel found that the teacher's decision did not implicate the student's right to freedom of expression. Differentiating between speech that is promoted by the school and speech that is tolerated, it found the class readings in the present case fell into the former category. As such, it was speech that took place in a non-public forum as part of the school's curriculum. Under those circumstances, it was speech subject to content-based restrictions related to legitimate pedagogical concerns. In the present case, the panel found that the teacher had a legitimate concern regarding the ability of her first grade students to comprehend that the school was not promoting a religious message by allowing a Bible story to be read. Turning to the claim regarding the removal of the poster, the panel again looked to *Hazelwood* for guidance and concluded that school officials had a legitimate concern that the school not be perceived as promoting a religious message. In regard to the Establishment Clause claims, the panel agreed with the district that the actions of the teacher and school board members should be subject to scrutiny under the *Lemon* test. Applying the three part test to both the removal of the poster and teacher's decision to prohibit the student from reading his story, it concluded that there was no Establishment Clause violation because in both cases the school had steered the constitutionally neutral course of neither favoring one religion over another nor religious believers over nonbelievers.

Federal district court ruled that plaintiffs were not barred by *res judicata* from litigating the issue of whether the Cleveland school voucher program violates the establishment clause of the First Amendment because the Ohio Supreme Court's decision rested on independent state grounds. The court also ordered a preliminary injunction on the grounds of the plaintiffs' likelihood of success on the merits because the voucher program provides direct support not only to religious schools' secular educational programs but also to religious instruction.

Simmons-Harris v. Zelman, No. 99-1740 (N.D. Ohio August 24, 1999)

Following the Ohio Supreme Court's decision holding that the Cleveland voucher program violated the state constitution's single subject provision, the state legislature re-enacted it to comply with the court's ruling. Plaintiffs, parents and taxpayers, filed suit against the state in federal district court. Alleging that the voucher program violated the establishment clause of the First Amendment, they sought a preliminary injunction. The state countered that the plaintiffs were barred by the doctrine of *res judicata* from relitigating the First Amendment issue because the Ohio Supreme Court had ruled on it. The plaintiffs responded that the Ohio Supreme Court's ruling on the issue was dicta because it was unnecessary to the court's decision.

The district court began by holding that the plaintiffs were not barred from litigating the establishment clause issue by the doctrine of *res judicata*. It found that although the plaintiffs had a full and fair

opportunity to argue the First Amendment issue before the state supreme court, the issue was not essential to the supreme court's decision. The district court agreed with the plaintiffs that the Ohio Supreme Court's decision "could be fully supported by the state law ground—that the Legislature passed the law in violation of the one-subject bill." It also observed that the plaintiffs' argument was furthered strengthened by the fact that the plaintiffs were effectively barred from appealing the state court decision to the U.S. Supreme Court on the federal issue because the U.S. Supreme Court does not entertain appeals from final judgments that rest on federal and state grounds where the state ground is sufficient to uphold the judgment.

The district court then turned to the motion for a preliminary injunction. Focusing on the likelihood of success on merits as the crucial factor in determining if the preliminary injunction should be issued, the court examined the voucher program in light of the *Lemon* test and the Supreme Court's decisions in *Nyquist*, *Mueller*, *Witters*, *Zobrest*, and *Agostini*. The district court found that the issue in *Nyquist* was the same as in the present case, which the court framed as,"Does the program under review have the effect of advancing religion?" The district court like the Court in *Nyquist* concluded that the program had the effect of advancing religion because the voucher program provided unrestricted grants to parents in the form of scholarships to send their children to "nonpublic schools, the bulk of which is concededly sectarian in orientation." Based on the findings that 80% of participating schools were sectarian, 85% of students participating were attending sectarian schools, and no adjacent public school districts opted to participate in the program, the district court found in effect that religious schools were direct beneficiaries of the voucher program because there were no restrictions that the funds be used only for secular educational purposes. It rejected the state's contention that *Nyquist* had been overruled by the Supreme Court's subsequent rulings in *Mueller*, *Witters*, *Zobrest*, and *Agostini*. In fact, the district court cited *Agostini* for proposition that the Court directed lower courts to follow the case if it was on point. It also rejected the state's argument that *Nyquist* had been undermined by subsequent cases. Instead, the district court distinguished the programs in *Mueller*, *Witters*, *Zobrest*, and *Agostini* from the programs in *Nyquist* and the present case. The common factor it found in the programs in *Mueller*, *Witters*, *Zobrest*, and *Agostini* was that the programs in those cases provided indirect, incidental benefits to religious schools because no public funds were placed in the schools hands, rather services were provided to students that they would received if they were attending public school. In regard to *Agostini*, the court pointed out that the program in that case merely allowed students attending religious schools as a result of parental choice to receive the same remedial services they would have at a public school. (*See* What's new in the Supreme Court, at 13, *infra* for current developments in this case.)

School district's scheduling of spring break around Christian holiday of Easter was not subject to strict scrutiny by the court because the vacation applied to all students regardless of their religious beliefs and, therefore, did not discriminate between religious denominations or between religion and nonreligion. School district's scheduling of spring break around Easter did not violate the establishment clause because the school district's action had a secular purpose, did not advance or inhibit religion, and did not create excessive government entanglement with religion.

Koenick v. Felton, No. 97-1935 (4th Cir. August 20, 1999)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=4th&navby=case&no=971935P

Teacher filed suit challenging school district's scheduling of spring break around Christian holiday of Easter. She argued that this district action should be subject to strict scrutiny by the court because it discriminated against non-Christians in violation of the establishment clause. Rejecting the teacher's argument on strict scrutiny, the district court applied the *Lemon* test and granted the school district's motion for summary judgment.

The Fourth Circuit panel decision affirmed the district court's ruling. It rejected the teacher's contention that the scheduling of spring break around Easter created a facially denominational preference subject to strict scrutiny. The panel stated that the spring break provided all students in the school district with a vacation from which they benefited regardless of their religious beliefs. As a result, the panel concluded that the *Lemon* test should be applied to the school district's action. Applying the three-part test, the panel found the scheduling of spring break around Easter: (1) satisfied the secular purpose prong because it was scheduled to minimize the absenteeism and loss of productivity of teachers and students associated with the Easter holiday; (2) did not advance or inhibit religion because all students benefited from the break, and any benefit to religion was incidental; and (3) did not create excessive entanglement with religion because the school district scheduled the spring break without any input from religious groups or leaders.

ELEVENTH AMENDMENT

Congress lacked power under section 5 of the Fourteenth Amendment to abrogate the states' immunity when it enacted IDEA. However, state did waive its immunity from IDEA claim when it accepted IDEA funds. State's Eleventh Amendment immunity did not bar parents from seeking prospective injunctive relief against state officials to prevent any future conduct in violation of IDEA. State was entitled to Eleventh Amendment immunity from section 504 claim because section 504 was not appropriate exercise of Congress's section 5 power. State did not waive its immunity from section 504 claim when it accepted federal funds because the condition imposed by section 504 was not a valid exercise of Congress's spending power.

Bradley v. Arkansas Department of Education, No. 98-1010 (8th Cir. August 31, 1999)

http://ls.wustl.edu/8th.cir/opinions.html

Parents of disabled student filed suit in federal district court against the state department of education and school district, alleging that the defendants had violated the IDEA and section 504 because they had failed to provide adequate due process under IDEA to review the student's IEP. The district court denied the defendants' motions to dismiss IDEA and section 504 claims based on Eleventh Amendment immunity on the grounds: (1) that Congress had abrogated the states' immunity under both IDEA and section 504; and (2) when the state accepted funds under IDEA and section 504's spending programs it waived its immunity. The state filed interlocutory appeal. The parents, with the United States intervening in support, argued that there were three exceptions to the state's assertion of Eleventh Amendment immunity: First, Congress exercised section 5 power to abrogate the states' immunity when it enacted IDEA and section 504; second, when the state accepted federal funds as part of IDEA and section 504's spending programs it waived its immunity; and third, even if the state was entitled to Eleventh Amendment immunity, individual state officials could be enjoined from any future conduct in violation of IDEA or section 504.

An Eighth Circuit panel affirmed the district court's denial of the state's motion to dismiss the IDEA claim on the grounds that the state

had waived its Eleventh Amendment immunity when it accepted federal funds from IDEA's spending program. However, the panel reversed the district ruling on the section 504 claim, ruling that the state's immunity had not been abrogated or waived. In addition, it held that even if the state retained its sovereign immunity, the parents could maintain a suit against individual state officials seeking prospective injunctive relief against future conduct violating IDEA. In order to determine whether the states' immunity was abrogated by IDEA, the panel's analysis focused on whether Congress had the power under section 5 of the Fourteenth Amendment to abrogate the states' immunity when it enacted IDEA. Based on Supreme Court precedent, legislation is an "appropriate exercise of Congress's § 5 power" only if it is preventative or remedial. Citing *Florida Prepaid* from the trilogy of Eleventh Amendment cases, the panel stated that legislation could satisfy the "preventative or remedial" requirement only if Congress identified "the conduct transgressing the Fourteenth Amendment's substantive provisions," and tailored "its legislative scheme to remedying or preventing such conduct." After reviewing IDEA's legislative history, it concluded that Congress had failed to adequately identify the constitutional transgressions it sought to remedy when it enacted IDEA because the disparate treatment of disabled students listed by Congress was not a result of state action, or if it was, it did not violate the equal protection clause. Additionally, the panel concluded that even if Congress had adequately identified the constitutional transgressions it sought to remedy by enacting IDEA, IDEA's abrogation provision would be invalid because IDEA was not an appropriate exercise of Congress's section 5 power. However, it concluded that sections 1403 and 1415 of IDEA provided states with a clear, unambiguous warning that participation in the IDEA program and acceptance of federal funds would constitute a waiver of their immunity. The panel addressed the parents' argument that even though they were barred by the Eleventh Amendment from suing the state in federal court, they could, based on *Ex Parte Young*, maintain an action against individual state officials to enjoin them from any future violations of IDEA. The panel not only agreed with the parents' contention, but also stated even if *Ex Parte Young* did not apply, the state's waiver of immunity constituted a waiver as to its officials.

Turning to the parents' section 504 claims, the panel held that the state's Eleventh Amendment immunity had not been abrogated or waived. Applying the *Seminole Tribe* test, it concluded as it had with the IDEA claim that Congress lacked section 5 power to abrogate the states' immunity when it enacted section 504. Regarding the issue of whether the state's acceptance of federal funds under section 504 constituted a waiver, the panel found that unlike IDEA, section 504 was not a valid exercise of Congress's spending power because the conditions imposed on states were overly broad. Specifically, the prohibitory language in section 504 applies to any program or activity receiving federal funding. As a result, the panel concluded that the conditions amounted to impermissible coercion exceeding the "ordinary *quid pro quo* involved in a proper exercise of Congress's spending power."

RACE BASED ADMISSIONS

School district's elementary school admissions policy involving the use of racial classifications in a weighted random lottery constituted racial balancing which violated applicants' equal protection rights because policy was not narrowly tailored to achieve a compelling governmental interest.

Tuttle v. Arlington County School Board, No. 98-1604 (4th Cir. September 24, 1999)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=4th&navby=case&no+981604P

After school board's previous elementary school admissions policy was ruled unconstitutional in *Tito v. Arlington County School Board*, the school board drafted a new admissions policy that involved a weighted random lottery with race as one of the weighting factors. When two white applicants failed to gain admission, their parents filed suit, alleging that the board's weighted random lottery violated their equal protection rights because it gave a preference based on race. The district court granted a permanent injunction, ordering the school board to institute a lottery system without any preferences. It held that the policy violated the equal protection clause because: (1) diversity, as a matter of law, can never serve as a compelling governmental interest; and (2) the policy was not narrowly tailored to achieve the school board's stated goal of promoting racial and ethnic diversity in the schools. Three issues were raised on appeal. First, the parents contended that the school board was collaterally estopped from disputing the district court's conclusion of law that diversity was not a compelling interest. Second, the school board argued that the admissions policy did not violate the equal protection clause. Third, the school board argued that the district court's injunction was overbroad.

A Fourth Circuit panel affirmed in part, vacated in part, and remanded the case. Addressing whether the school board was collaterally estopped from raising the issue of diversity as a compelling interest, the panel concluded that *Tito* did not bar the school board from raising the issue because the admissions policy in *Tito* was substantially different from the one in the present case. Turning to the issue of whether the board's racially weighted admissions policy was unconstitutional, the panel pointed out that any governmental action involving racial classification was subject to strict scrutiny. As a result, it stated that the school board must show that the policy: (1) serves a compelling governmental interest; and (2) the policy is narrowly tailored to achieve that interest. Regarding the first part of the test, the panel noted that neither the Supreme Court nor the Fourth Circuit has ruled on whether diversity is a compelling interest. The Fourth Circuit , assuming arguendo that diversity is a compelling governmental interest, concluded that the admissions policy was not narrowly tailored to achieve that goal. The panel found that the racially weighted random lottery constituted racial balancing, and was unconstitutional because the policy was not remedial. In the panel's opinion, the policy granted preferential treatment to certain applicants solely on the basis of their race while placing an undue burden on those "innocent" applicants who do not meet any of the policy's diversity criteria. Regarding the final issue raised by the school board, the panel agreed that the district court had abused its discretion in ordering the school board to adopt a particular policy. It stated that while the parents were entitled to an injunction, the district court "should have taken the less intrusive step of continuing to monitor and review alternative programs proposed by the School Board."

School district that had complied with all aspects of court ordered desegregation plan achieved unitary status even though some of its schools were racially imbalanced because the imbalance was the result of socio-economic factors rather than intent to discriminate. School district's magnet school admissions policy created a racial quota in violation of the equal protection clause by utilizing two separate lotteries, one for black applicants and one for nonblack applicants.

Capacchione v. Charlotte-Mecklenberg Schools, No. 97-482 (W.D.N.C. September 9, 1999)

1999 WL 709975 (W.D.N.C.)

School district had been operating under a court ordered desegregation plan for approximately thirty years. Pursuant to the plan, the

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school district had established magnet schools to address the problem of racial imbalance in the student population in its urban schools. The magnet school admissions policy utilized separate lotteries for black applicants and nonblack applicants. When a white applicant failed to gain admission to an elementary magnet school, her parents filed suit against the school district. They alleged that the admissions policy was nothing more than a rigid quota in violation of the Equal Protection Clause. The plaintiffs in the original school desegregation suit (*Swann*), then, reactivated their case. The *Swann* plaintiffs, joined by the school district, argued that the district should not be released from its obligations under the plan. Following the submission of extensive statistical studies and testimony from experts on both sides, the district court ruled that the school district had achieved unitary status. In addition, the court held that the magnet school admissions policy was unconstitutional.

In a lengthy opinion, the district court judge engaged in a detailed analysis of the statistical and testimonial evidence regarding racial imbalance in the district's schools, faculty, staff, facilities, resources, transportation, and student achievement as measured against the desegregation plan. The judge concluded that the school district had not only complied with all aspects of the desegregation plan, but had acted over and above in order to achieve a desegregated school system. In the court's opinion, any racial imbalance in the schools was a result of socio-economic factors, such as housing patterns, which were outside the school district's control. As a result, the judge declared that the district had achieved unitary status. Turning to the magnet school admissions policy, he noted that the admissions policy use of racial criteria subjected it to the strict scrutiny test. The judge found that the policy satisfied the compelling interest element because the school district was under court order when it implemented the policy. However, he found that the school district had failed to satisfy the narrowly tailored element. Specifically, he concluded that the use of separate lotteries for black applicants and non black applicants was an inflexible policy that resulted in set-asides for black applicants, placing an unfair burden the non black applicants.

State university elementary laboratory school's use of race/ethnicity as a factor in its admissions policy did not violate the equal protection clause because: the state had a compelling governmental interest in operating a laboratory school dedicated to improving the quality of education in the state's urban public schools; and the admissions policy's use of the race/ethnicity factor was narrowly tailored to further that interest.

Hunter v. Regents of the University of California, No. 97-55920 (9th Cir. September 9, 1999)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=9th&navby=case&no=9755920

State university operates an elementary laboratory school whose mission is to conduct research and training in order to improve the quality of the state's urban public schools. Students are admitted to the school based on the weighing of several socio-economic and cultural factors, including race/ethnicity, in order to recreate a sample of the student population in the state's urban schools. When an applicant was denied admission, her parents filed suit against the university. They alleged that the school's use of racial/ethnic factors in its admissions policy violated the equal protection clause. Applying the strict scrutiny test to the admissions policy, the district court concluded that the state's interest in improving urban schools was compelling and that use of the race/ethnicity factor in the admissions policy was narrowly tailored to achieve that interest.

A Ninth Circuit panel in a two-one split affirmed the district court. The majority cautioned that neither the school's designation as a laboratory school nor its stated mission of "educational research" alone would justify the use of racial/ethnic classifications in its admissions policy. However, it held that the expert testimony presented at trial was sufficient to establish: (1) that the state's interest in creating a research and training laboratory dedicated to improving the state's urban public schools was a compelling interest; and (2) that the use of race/ethnicity as a factor in the admissions policy was narrowly tailored to further that interest. Specifically, the majority found that in order for the university to obtain an accurate sample of the urban public school student population of the state it was necessary for the university to use racial/ethnic classifications. Therefore, the majority concluded that the school was "a research-oriented laboratory dedicated to developing effective techniques for use in urban public schools — a project that benefits public school children throughout the state. [The state] has a compelling interest in providing effective education to its diverse, multi-ethnic, public school population. [The university's] use of race/ethnicity in its admissions process is narrowly tailored to achieve the necessary laboratory environment to produce research results which can be used to improve the education of [the state's] ethnically diverse urban public school population."

White student's equal protection rights were violated when the school board denied his request for transfer to a magnet school based on the board's policy that considers race as a factor in determining whether to approve transfers because: the board's use of racial classifications in order to achieve racial balancing in the district's schools is unconstitutional; and the use of race as a factor was not narrowly tailored to achieve the board's stated goal of diversity.

Eisenberg v. Montgomery County Public Schools, No. 98-2503 (4th Cir. October 6, 1999)

http://www.law.emory.edu/4circuit/oct99/982503.p.html

Parents of a white first grade student requested a transfer to a district magnet school. The school district's voluntary transfer policy considers five factors: school stability, utilization/enrollment, diversity profile, and the reason for the request. The request was denied on the ground of "impact on diversity." While the countywide enrollment of white students is 53%, white enrollment in the student's school is 24%, having dropped from 39% in 1994-95. The parents filed suit seeking declaratory and injunctive relief, along with damages. They alleged violations of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. They then brought a motion for a preliminary injunction, requesting that the district court order the school district to admit the student to the magnet school. The district court denied the parents' motion on the grounds: (1) that the potential harm to the school district in granting the injunction outweighed the potential of irreparable harm to the student if it was not granted; (2) the parents failed to show a strong likelihood of success on the merits; and (3) the denial of the motion is not contrary to the public interest. Addressing the balancing of the student's hardship against that of the school's, the court found that the student would receive a comparable education regardless of which school he attended. On the other hand, it pointed out that if the student was allowed to transfer, it could open a floodgate of transfers by white students with resulting racial isolation within the district. The district court noted that because the balance favored the school district, the parents must show a strong likelihood of success on the merits. It framed the issue as whether the school district "can take race into account in deciding whether to approve transfer requests within Montgomery County." It stated that where race is a factor in the decision making process, the challenged policy is subject to strict scrutiny.

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The court analyzing the interests asserted by the school district, found both the diversity and preventing racial segregation arguments compelling interests. The district court, relying on *Bakke*, *Wessmann v. Boston School Committee*, 996 F. Supp. 120 (D. Mass 1998), and *Wiggant*, found support in existing case law for the proposition that diversity alone is a sufficiently compelling interest to satisfy the strict scrutiny standard. Regarding the school district's interest in avoiding the creation of racially segregated enrollment patterns, it found the district has a compelling interest in not facilitating a discriminatory environment through state action. Moving to the second prong of the strict scrutiny test, the court concluded that the transfer policy is narrowly tailored to accomplish the district's goals of diversity and avoiding racial segregation. It disagreed with the parents' contention that race is the only factor considered under the policy. It pointed out that other factors are considered, such as family unity and parental hardship, without regard to race. It also noted that the school district engages in periodic review of the transfer policy to ensure it remains as narrow as possible. Finally, the district court considered the impact on the public interest if it denied the motion. It concluded that based on the school district's goals of promoting diversity in the public schools, the transfer policy is not contrary to the public interest.

A Fourth Circuit panel reversed and remanded. It stated that the school board had failed to overcome the constitutionally mandated presumption that the use of racial classifications is unconstitutional. Applying the strict scrutiny test to the board's transfer policy, beginning with the two compelling interests set forth by the board, avoiding the creation of racial isolation by use of transfers and promoting racial/ethnic diversity, it concluded these interests were actually the same, diversity. The panel observed that whether diversity constituted a compelling governmental interest remained unresolved, and that it chose to leave the issue unresolved. It also noted that the school board had not argued and could not argue that the race-based transfer policy was remedial in nature because the school district had never been under a court ordered desegregation plan to correct past constitutional violations.

The panel then turned to a discussion of the narrowly tailored element of the strict scrutiny test. The panel concluded that the board's transfer policy was nothing more than an attempt at racial balancing. Citing the Ninth Circuit's opinion in *Spangler v. Pasadena Board of Education*, 611 F.2d 1239 (9th Cir. 1979), and the Supreme Court's opinion in *Freeman v. Pitts*, 503 U.S. 467 (1992), for the proposition that where racial imbalance in a school district results from housing patterns, a school board can not be constitutionally faulted if it adopts a racially neutral student assignment policy, the panel concluded that any racial imbalance that occurred in the school district because students like the plaintiff are permitted to transfer to magnet schools "is a product of 'private choice [and] it does not have constitutional implications.'" It rejected the board's argument that the annual review of the diversity profile for each school made the policy narrowly tailored. On the contrary, the panel found that the review was clearly an attempt to regulate transfers by making school-by-school adjustments in regard to racial/ethnic makeup. In addition, the panel concluded that the use of nonracial factors, such as unique personal hardship, did nothing to narrow the policy because race remained a determining factor. It found, as did the court in *Tuttle*, that the use of race in assigning students "skew[s] the odds in favor of certain minorities."

FOURTH AMENDMENT

Sniffing of student in a school setting by police dog in the absence of individual suspicion constituted an unreasonable search under the Fourth Amendment. However, school officials and police officers who conducted the search were entitled to qualified immunity from section 1983 suit because at the time the search occurred, it was not clearly established that use of dogs to sniff students in a school setting constituted a search.

B.C. v. Plumas Unified School District, No. 97-17287 (9th Cir. September 20, 1999)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=9th&navby=case&no=9717287

Students were instructed by school officials to leave their classroom and wait in the snack bar to allow a police drug dog to sniff the students' personal possessions in the classroom. While the dog was walking past the students, it alerted to a student other than the plaintiff in this case. After the dog completed its task, it again was walked past the students and alerted to the same student. That student was taken away and searched by school officials. No drugs were found that day at the school. Plaintiff filed suit under § 1983, alleging that the police dog's sniffing constituted an unreasonable search in violation of his Fourth Amendment rights. District court held that the dog's sniffing of the students constituted an unreasonable search. However, the court granted the defendants' motion for summary judgment in their individual capacities on the ground that they were entitled to qualified immunity because it was not clearly established at the time the search occurred that use of drug sniffing dogs on students in a school setting constituted a search.

A Ninth Circuit panel affirmed. Noting that the issue of whether using a drug sniffing dog on a person constituted a search was one of first impression in the circuit, the panel observed that only the Fifth Circuit, holding it was a search, and the Seventh Circuit, holding it was not, had ruled on the question. Finding the Fifth Circuit's opinion in *Horton v. Goose Creek Independent School*, 690 F.2d 470 (5th Cir. 1982), persuasive, the panel held that the use of drug sniffing dogs to sniff a student's person was a search. The panel then found, as had the district court, that the search in the present case was unreasonable because it was a random, suspicionless search where the school district failed to identify a specific drug problem or crisis in the school district that outweighed the students' expectation of privacy. Concluding that the search was in violation of the students' Fourth Amendment right to be free of unreasonable searches, the panel sought to determine whether the defendants were entitled to qualified immunity. Having previously stated that there was no preexisting law in the Ninth Circuit "clearly establishing" that the use of drug sniffing dogs on the person of students in a school setting constituted a search, the panel held that school and police officials could not have reasonably understood that allowing the dog to sniff the students violated the students' Fourth Amendment search and seizure rights. It, therefore, affirmed the district court's holding that the individuals were entitled to qualified immunity.

Search of teacher's car by school security officer that occurred after drug sniffing dog alerted to the car during a school-wide drug sweep conducted by local law enforcement did not violate school's drug policy requiring employee's consent or a search warrant because school's policy applied only to intra-school searches, i.e., those conducted by school officials or employees. Search also was not unreasonable under the Fourth Amendment because it was based on probable cause generated by the dog sniff, and justified by the automobile exception to the general requirement for a search warrant.

Hearn v. Board of Public Education of Chatham County, No. 98-8390 (11th Cir. October 6, 1999)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=11th&navby=case&no=988390OPN

During a school-wide drug sweep conducted by local law enforcement, in which school security participated, a drug sniffing police dog alerted to a teacher's car, which was unlocked with a window open. A school security officer searched the car and found marijuana. The results of the search were reported to the principal who informed the teacher that under the school board's employee drug policy, the teacher was required to undergo immediate drug testing. The teacher refused and was suspended by the superintendent. The superintendent recommended that the teacher be terminated for insubordination for refusing to take the test. The board conducted a hearing and voted to accept the superintendent's recommendation. After exhausting her administrative remedies, the teacher filed suit against the board. She alleged that the grounds for termination were invalid because the principal lacked the reasonable suspicion required by the policy to order the drug testing. Specifically, the teacher argued that the search violated both the board's policy and the Fourth Amendment. The district court granted the school board's motion for summary judgment.

The Eleventh Circuit, in a two to one split panel decision, affirmed the district court. The majority found the teacher's arguments without merit. Regarding the school employee drug policy, the panel stated that the policy was "legally irrelevant" to the search of the teacher's car because the policy applied only to intra-school searches, i.e., searches initiated and conducted by school officials or employees. It rejected the teacher's contention that the search was brought within the policy because a school security officer actually searched the car. The majority pointed out that the search was initiated by local law enforcement and school security was merely participating. As a result, the majority concluded that the police officers' authority to search was limited only by the Constitution. Turning to the Fourth Amendment objection raised by the teacher, the panel noted that the extent of the teacher's expectation of privacy was located in constitutional law, not the board's policies. Focusing on that privacy expectation in light of the Fourth Amendment's proscriptions, it first found no expectation of privacy in regard to odors emanating from her car. It observed that use of dogs to sniff personal property in a public place does not constitute a search. In addition, it found that the drug-sniffing dog supplied the police with not only reasonable suspicion, but also probable cause, to search the car. Finally, because the property alerted to was a vehicle, it fell within the well-recognized automobile exception to the general requirement for a search warrant.

The dissent took issue with the majority on two points. First, it disagreed with the majority's assertion that the search of the car was not an "intra-school" search conducted by school security because the search occurred as part of a greater school-wide sweep for drugs by local law enforcement. The dissent contended that the police did nothing more than bring the dog on campus so that when it alerted to the teacher's car, school security had its pretext for searching the vehicle. However, the dissent argued that search of the car could not provide the reasonable suspicion required to trigger the mandatory drug testing provision of the policy because it was an intra-school search made without consent or a search warrant as required by the board's drug policy. Second, the dissent concluded that absent reasonable suspicion for a valid search, the teacher was not obligated under her employment contract to submit to drug testing.

AMERICANS WITH DISABILITIES ACT

Student who was barred from participating in school's show choir based on her depression and absenteeism stated a cause of action for discrimination based on disability under the ADA because the disability need not be the sole motivating cause for the discriminatory action. However, student did not have a cause of action for retaliation under the ADA against school officials in their individual capacities.

Baird v. Fairfax County School Board, No. 98-2064 (4th Cir. September 22, 1999)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=4th&navby=case&no=982064P

Student auditioned and was accepted to participate in middle school's show choir. The student missed several days of school and consequently several choir practices because of a recurrent sinus infection. The relationship between the choir instructor and student became strained to the point that the student attempted suicide after failing to obtain a lead role in a school play because she believed the instructor had sabotaged her audition. The student was diagnosed as suffering from depression, and her teachers were informed before she returned to school. The choir instructor refused to allow the student to participate in the next show choir on the ground that the student's depression would render her unable to meet her responsibilities. The student's mother brought suit in state court, alleging violation of the ADA and intentional infliction of emotional distress against the school board, and the teacher and principal in both their individual and official capacities. The school board removed the suit to federal district court and moved to dismiss. The district court granted the motion on the grounds that there was no discrimination because the student's absenteeism rather than her depression was the basis for her exclusion from the choir.

A Fourth Circuit panel reversed and remanded as to the ADA claim against the board, and the teacher and principal in their official capacities, but affirmed in regard to the retaliation claim against the teacher and principal in their individual capacities. Noting that there was no dispute that the student was a "qualified individual with a disability," the panel focused on the question of whether disability had to be the sole basis for exclusion in order to state a valid claim under the ADA. Specifically, the panel reviewed a previous Fourth Circuit case, *Doe v. University of Maryland Medical Systems Corp.*, 50 F.3d 1261 (4th Cir. 1995), which the school board cited as requiring that the discrimination be based "solely" on the disability. The panel rejected the board's contention, instead finding that the language in *Doe* was dicta and not conclusive regarding whether the student adequately alleged a violation of the ADA by claiming her disability was a "motivating" rather than sole cause of the discrimination. After comparing the statutory language of the ADA with section 504, the panel concluded that while section 504 requires the discrimination to be "solely by reason" of the disability, the language in the ADA was significantly dissimilar. Relying on the Eleventh Circuit's reasoning in *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996), the panel held that the ADA does not impose a "solely by reason of" standard of causation. As a result, it ruled that the student had stated a cause of action under the ADA against the board because the teacher initially excluded the student from the show choir after being informed of her depression. Turning to the student's claim of retaliation, the panel stated that the language of the ADA adopted the same remedies as Title VII. It, therefore, found that, like Title VII, the ADA does not authorize a remedy against individual defendants for violation of its provisions.

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EMPLOYMENT

Unsuccessful applicant for teaching position, who was not rated as qualified by school board's interview team, failed to state a cause of action under section 1983 based on violation of his property interest in a veteran's hiring preference because under state law veteran's hiring preference was available only to applicants judged by a hiring body to have the requisite qualifications.

Basile v. Elizabetown Area School District, No. 98-2257 (E.D. Pa., August 12, 1999)

1999 WL 615868 (E.D. Pa.)

Veteran unsuccessfully applied for a teaching position with school district for two consecutive years. On both applications, he listed his military service under "other qualifications." Although he made it through the preliminary steps of the hiring process, each year the applicant was eliminated from further consideration when a school board team did not deem him qualified to be a teacher. The applicant filed suit against the school district, raising several constitutional claims, all of which the district court ruled were without merit except for the section 1983 due process claim. He alleged that the school district had violated his procedural due process rights because it failed to grant him a veteran's preference in considering his application. Specifically, he argued that the state law granting a veterans' preference created a recognized property interest subject to due process protection.

The district court agreed that the state's veterans preference act created a property interest for applicants seeking non-civil service public positions provided they were "qualified" for the position. However, the court disagreed with the applicant as to the appropriate point during the hiring process to apply the preference. Reviewing the statutory language, the court found it clear that a veteran was entitled to a preference "only if he possesses the necessary qualifications for a position as determined by the hiring body." It rejected the applicant's contention that the criteria by which the interview team judged him unqualified was invalid under the controlling case on the issue of veteran preferences, *Brickhouse v. Spring-Ford Area School District*, 656 A.2d 483 (Pa. 1995). On the contrary, the court found that the qualifications used by the interviewing team during the hiring process were completely reasonable under the standard set forth in *Brickhouse*. It also rejected the applicant's contention that the determination of "qualification" comes too late in the hiring process for the veteran hiring preference to benefit veterans. The district court pointed out that the preference applies to any remaining applicants who are veterans, giving them a preference over the other remaining teaching candidates.

SECTION 1983

High school wrestling coach who invited alumni wrestlers to practice with lighter, less experienced varsity wrestlers and athletic director who allowed it could be held liable under section 1983 based on the theory of "state created danger" for violation of high school wrestler's Fourteenth Amendment right to bodily integrity . Neither the wrestling coach nor athletic director were entitled to qualified immunity from wrestler's section 1983 action. School district also could be held liable under section 1983 based on "state created danger" theory for wrestler's injuries because the "alumni" wrestler program constituted a custom, policy, or practice ratified by the school district.

Sciotto v. Marple Newtown School District, No. 98-2768 (E.D. Pa. Sept. 23, 1999)

1999 WL 740691 (E.D. Pa.)

Alumni wrestler invited by high school coach to practice with varsity wrestling team as part of "alumni wrestler program" tradition participated in a live match with a varsity wrestler who was lighter, younger, and less experienced. During the match, the varsity wrestler suffered a spinal cord injury that left him quadriplegic. The injured wrestler filed suit under section 1983 against the wrestling coach, the school's athletic director, and school district based on the theory of "state created danger" for violating his due process right to bodily integrity. Regarding the section 1983 claims against the coach and the athletic director, the plaintiff alleged that their allowing older, heavier, and more experienced college wrestlers to wrestle younger, lighter, and less experienced high school wrestlers created a foreseeable and unreasonable risk of harm to the plaintiff. As to the section 1983 claim against the school district, the plaintiff alleged that the "alumni wrestler program" constituted a custom or practice because the school district knew about this dangerous tradition and failed to end it. He also argued that the school district's deliberate indifference to the risk of harm posed by the "alumni" program constituted a policy, custom or practice for which it could be held liable under section 1983. Both the plaintiff and defendants moved for summary judgment. The school district, the coach, and the athletic director argued that the plaintiff had failed to allege facts sufficient to establish a section 1983 claim based on "state created danger." In addition, the coach and the athletic director asserted qualified immunity, while the school district contended that the plaintiff had failed to satisfy the required elements necessary to establish municipal liability.

Addressing the sufficiency of the plaintiff's "state created danger" claim, the court reviewed the allegations in light of the four required elements. It concluded that the evidence presented by the plaintiff satisfied the first element that the "harm caused was foreseeable and fairly direct." Turning to the second element, it again concluded that the evidence was sufficient to demonstrate that the state actor acted with willful disregard for the plaintiff's safety. In particular, the court found that deposition testimony showed: (1) that both the coach and the athletic director knew about a previous injury resulting from the participation of an alumni at wrestling practice; and (2) that a reasonably knowledgeable wrestling official would recognize the danger of the alumni program. Regarding the requirement that there exist some relationship between the state and the victim, the district court concluded that the plaintiff, as a member of the wrestling team, was a discrete foreseeable victim of the danger created by the program. As to the last element that the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur, the court pointed out that the coach invited the alumni wrestler to participate in practice, and the athletic director was aware of the alumni wrestler tradition and condoned it.

Moving to the issue of whether the coach and the athletic director were entitled to qualified immunity, the district court found that the plaintiff's clearly established right to bodily integrity had been violated, and that given the coach's and athletic director's knowledge and experience as school officials that reasonable officials in their circumstances would have been aware of the plaintiff's right and their responsibility not to place him in harm's way as a result of deliberate indifference. The court, therefore, concluded that neither the coach nor the athletic director was entitled to qualified immunity.

On the issue of whether the municipal liability attached to the school district based on the "state-created danger" theory, the court observed that it was a question of whether the wrestling team's tradition of having "alumni" wrestlers participate in practices constituted a custom, policy, or practice. In answering the question, the district court focused on whether the state ratified the unconstitutional conduct of its employees. In the instant case, it found that the school district was well aware of the custom of inviting "alumni" wrestlers to participate in varsity practices and the danger involved in the custom. As a result, the court found that the school district could be held liable under section 1983 based on the theory of "state-created danger," because the district's failure to stop the tradition constituted ratification of it. However, the district court rejected the plaintiff's assertion of section 1983 liability against the school district based on the theory that the district was deliberately indifferent to the risk of danger because it maintained a custom, policy, or practice of allowing heavier, older, more experienced "alumni" wrestlers to participate in practice. It found that the plaintiff's argument failed because the "linchpin" of the deliberate indifference theory required that the violative act be carried out by a state actor, rather than a third party as was the case here.

What's New . . .in the Supreme Court

SUMMARY DISPOSITION

A-320: ***Zelman v. Simmons-Harris***, No. 99-1740 (N.D. Ohio Aug. 24, 1999). On Nov. 5, 1999 the Supreme Court granted by a 5-4 margin a request by the State of Ohio that new students be allowed to participate in Cleveland's voucher program while litigation surrounding its constitutionality continues. Ohio requested emergency action by the Supreme Court when the Sixth Circuit failed to respond to its request for review of a district court order prohibiting participation of new students. Trial in the case is scheduled to begin on Dec. 31, 1999.

ARGUED

98-405, -406: ***Reno v. Bossier Parish School Board and Price v. Bossier Parish School Board***, 7 F. Supp.2d 29 (D.D.C. 1998). Supreme Court has heard arguments in this consolidated appeal from a decision by the U.S. District Court for the District of Columbia that ruled that where it could not be shown that a school board had adopted a redistricting plan with any retrogressive intent, the plan was entitled to preclearance under Section 5 of the Voting Rights Act. Probable jurisdiction noted, Jan. 22, 1999. Argued, Apr. 26, 1999. On June 24, 1999 the Supreme Court issued an order restoring this case to the calendar for reargument. It directed the parties to file supplemental briefs addressing the following questions: (1) Does the purpose prong of Section 5 of the Voting Rights Act of 1965 extend to discriminatory but non-retrogressive purpose? (2) Assuming arguendo that Section 5 prohibits the implementation of a districting plan enacted with a discriminatory, non-retrogressive purpose, does the government or the covered jurisdiction bear the burden of proof on this issue? Argued, Oct. 6, 1999.

98-791, -796: ***Kimel v. Florida Board of Regents and United States v. Florida Board of Regents***, 139 F.3d 1426 (11th Cir. 1998). Supreme Court has accepted for review Eleventh Circuit case raising the issue of whether Congress abrogated the states' Eleventh Amendment immunity from suit in federal court when it added states to the definition of employer under the Age Discrimination in Employment Act. *Cert. granted*, Jan. 25, 1999. Argued, Oct. 13, 1999.

98-1189: ***Board of Regents of University of Wisconsin System v. Southworth***, 151 F.3d 717 (7th Cir. 1998). Supreme Court will hear oral arguments in case out of the Seventh Circuit which held that by allocating part of mandatory student activities fees to organizations that engage in political and ideological speech, state university violated the First Amendment rights of students who did not wish to subsidize those groups' activities. *Cert. granted*, March 29, 1999. Argued, Nov. 9, 1999.

REVIEW GRANTED

98-958: ***United Brotherhood of Carpenters and Joiners of America v. Anderson***, 156 F.3d 167 (2d Cir. 1998). Supreme Court will give full consideration to Second Circuit holding that 42 U.S.C. § 1981 prohibits discrimination on the basis of alienage in the making and enforcing of private contracts. *Cert. granted*, April 26, 1999.

98-1648: ***Mitchell v. Helms***, 151 F.3d 347 (5th Cir. 1999) Supreme Court has accepted for review a Fifth Circuit decision that ruled that a Louisiana school district's program under Chapter 2 of Title I of the 1965 Elementary and Secondary Education Act (now Title VI of the Improving America's Schools Act) through which it used federal funds to purchase computers, software and library books for sectarian schools violates the establishment clause of the First Amendment. *Cert. granted*, June 14, 1999.

98-1828: ***Vermont Agency of Natural Resources v. United States***, 162 F.3d 195 (2d Cir. 1999). High Court will review decision of the Second Circuit that held that states are "persons" that can be sued under the *qui tam* provisions of the False Claims Act. Eleventh Amendment immunity does not apply in such actions brought by individuals because the real party in interest is the United States. *Review granted*, June 24, 1999. Argument scheduled, Nov. 29, 1999.

99-29: ***Brzonkala v. Morrison***, 169 F.3d 820 (4th Cir. 1999)(en banc). Supreme Court will review decision of the Fourth Circuit that held that Congress exceeded its authority under the commerce clause and the section 5 of the Fourteenth Amendment by creating private right of action for those who are subjected to violence motivated by gender under the Violence Against Women Act of 1994. *Cert. granted*, Sept. 28, 1999.

99-62: ***Santa Fe Independent School Dist. v. Doe***, 168 F.3d 806 (5th Cir. 1999). School district has asked Supreme Court to review Fifth Circuit determination that public school policy that permits high school students to choose whether to offer invoca-

tions and benedictions at football games without any restriction against sectarian and proselytizing prayers violates the establishment clause. *Cert. granted*, Nov. 15, 1999.

99-536: ***Reeves v. Sanderson Plumbing Products, Inc.***, unpub. op. (5th Cir. April 22, 1999). Supreme Court will determine whether in an action brought under the Age Discrimination in Employment Act, a plaintiff must show direct evidence of discriminatory intent in order to avoid judgment as a matter of law for the employer. *Cert. granted*, Nov. 8, 1999.

REVIEW DENIED

98-1932: ***Pataki v. Grumet***, unpub.op. (N.Y. Ct. App. May 11, 1999). New York Attorney General has sought Supreme Court review of a decision of the New York Court of Appeals that struck down on establishment clause grounds a state statute that allowed certain municipalities to form their own school districts under certain criteria. The state high court so ruled because the criteria excluded all but two municipalities in the state, one of which is a village of Satmar Hasidic Jews, the principal intended beneficiary of the statute. *Review denied*, Oct. 12, 1999.

98-2057: ***Norton v. Orinda Union School Dist.***, unpub. op.(9th Cir. 1999). Supreme Court left intact a ruling by the Ninth Circuit that learning disabled student with attention deficit disorder was not entitled to special education services under the Individuals with Disabilities Education Act. The student performed adequately with certain classroom modifications such as preferential seating, handwriting assistance and use of a word processor. *Review denied*, Oct. 4, 1999.

99-163: ***Bagley v. Raymond School Dep't***, 728 A.2d 127 (1999). High Court review is sought in case in which Maine Supreme Court ruled that it is not a violation of the free exercise clause or the equal protection clause to exclude parochial schools from tuition plan requiring public schools systems that do not operate their own schools to provide tuition to families to use to attend other public schools outside the district or approved private schools. *Review denied*, Oct. 12, 1999.

99-167: ***Joseph v. New York City Board of Education***, 171 F.3d 87 (2d Cir. 1999). High Court will not hear arguments in Second Circuit case involving whether Title VII plaintiff was entitled to recover damages under the 1991 Civil Rights Act Amendments. The Second Circuit had determined that black public school principal could not because her claim of race discrimination ripened when the superintendent decided to deny her tenure and terminate her employment. This decision was made prior to the effective date of the 1991 Amendments although an advisory administrative review regarding the matter was not completed until after that date. *Review denied*, Oct. 4, 1999.

99-233: ***DeShay v. Bastrop Independent School Dist.***, unpub. op. (5th Cir. April 16, 1999). Child with severe disabilities has petitioned the Supreme Court to review Fifth Circuit decision that his claims under the Rehabilitation Act and 42 U.S.C. § 1983 for injuries he suffered at school are barred. The Fifth Circuit found that the injuries had resulted from negligence not an official custom or policy or deliberate indifference and that the student had not shown that he was treated adversely based on his disability. *Review denied*, Oct. 12, 1999.

99-254: ***Strout v. Albanese***, 178 F.3d 57 (1st Cir. 1999). Supreme Court has been asked to hear challenge to First Circuit decision upholding exclusion of parochial schools from Maine tuition program under which public school districts that do not operate their own schools provide payments to families to use to attend other public schools or approved private schools. *Review denied*, Oct. 12, 1999.

REVIEW REQUESTED

98-1111: ***Texas v. Lesage***, 158 F.3d 213 (5th Cir. 1998). State of Texas is asking Supreme Court to review decision by the Fifth Circuit that Congress acted within its powers in abrogating the states' Eleventh Amendment immunity for suits brought under Title VI of the 1964 Civil Rights Act for discrimination based on race, color or national origin in programs receiving federal money. Texas also wants Court to determine whether an affirmative defense under *Mt. Healthy School Dist.* would completely bar liability or act merely as a limitation on damages. State also seeks determination of whether reverse discrimination plaintiffs enjoy lighter burden of evidence than minority plaintiffs seeking to preclude disposal of case on summary judgment. Filed, Jan. 1, 1999.

98-1658: ***Helms v. Picard***, 151 F.3d 347 (5th Cir. 1999). Review is sought in a Fifth Circuit case which approved against a First Amendment establishment clause challenge a public school system's provision of special education services to children voluntarily enrolled in parochial schools. The services were provided on site by public school teachers who were paid in part by a religiously affiliated corporation and were permanently assigned to teach for full school days at one sectarian school. Filed, April 13, 1999.

98-1671: ***Picard v. Helms***, 151 F.3d 347 (5th Cir. 1999). Louisiana Attorney General has asked the High Court to uphold the instructional material program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 as implemented by the Jefferson Parish School System and the state statute permitting the provision of school books and other instructional materials to all Louisiana school children, including those attending private sectarian schools. Filed, April 13, 1999.

99-463: ***Sullivan v. River Valley School Board***, unpub. op. (Mich. Ct. App. Nov. 6, 1998). Teacher has requested that Supreme Court review decision by Michigan Court of Appeals that his remarks did not constitute speech on a matter of public concern entitled to First Amendment protection. The Michigan court ruled that the teacher's comments were an extension of a private employment dispute involving his unsuccessful bid for a coaching job, withdrawal from the teachers' union and payment of representation fees. Filed, September 15, 1999.

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99-467: ***Trice v. Board of Trustees of Okolona Municipal School Dist.***, unpub.op. (5th Cir. June 11, 1999). Supreme Court has been asked to consider Fifth Circuit decision raising the issue of whether school district policies, practices and procedures create property rights for at-will employees. Filed, Sept. 9, 1999.

99-510: ***Indiana High School Athletic Assoc. v. Washington***, 181 F.3d 840 (7th Cir. 1999). High school athletic association is seeking review of Seventh Circuit holding that determination of whether a person is a qualified individual with a disability protected under Title II of the Americans with Disabilities Act turns on an individualized inquiry as to whether waiver in the instant case of an eligibility rule for participation in a public program would conflict with the purposes of the rule to such a degree that it constituted a fundamental and unreasonable change. Filed, Sept. 21, 1999.

99-527 & -574: ***Ryan v. Powell, and Ridge v. Powell***, 189 F.3d 387 (3d Cir. 1999). Supreme Court has been asked to hear arguments in Third Circuit case raising the issue of whether the U.S. Department of Education exceeded its authority under Title VI of the Civil Rights Act of 1964 by promulgating regulations that prohibit federal funds recipients from using criteria or administrative methods that have a disparate impact on racial minorities since Title VI prohibits only intentional discrimination. The Third Circuit had ruled that the regulations are valid and that there is an implied private right of action to enforce them. Filed, Sept. 24, 1999 and Oct. 1, 1999.

99-596: ***George Mason University v. Litman***, 4th Cir. 1999. Virginia's state attorney general has requested High Court review of Fourth Circuit decision that Congress validly conditioned the receipt of federal funds on the state's waiver of sovereign immunity from suits in federal court for alleged violations of Title IX of the Education Amendments of 1972. Filed, Oct. 5, 1999.

99-625: ***Jewell v. Dallas Independent School Dist.***, unpub. op. (5th Cir. July 14, 1999). Public school teacher has asked that Supreme Court review decision of the Fifth Circuit that she was provided adequate due process prior to her termination. The appellate court pointed out that she initiated grievances concerning two performance appraisals, she received a hearing, she was advised of the names of adverse witnesses prior to the hearing, she was represented by counsel and she had the opportunity to testify and cross examine witnesses. Filed, Oct. 8, 1999.

Chairman's Notes

CALL FOR NOMINATIONS

The Council of School Attorneys will be electing officers and three (3) new directors at the annual business meeting to be held on Saturday morning, April 1, 2000 at the Clarion Plaza Hotel. The Nominating Committee, as directed by the Council bylaws, "shall maintain a wide geographical representation on the Council Board of Directors to ensure that the professional interests and concerns of all members throughout the United States are represented." The Council encourages the nomination of minority members. If you would like to nominate a candidate, please submit the candidate's name and biographical information not later than January 5, 2000 to: Ann L. Majestic, Tharrington Smith, 209 Fayetteville Street Mall, P.O. Box 1151, Raleigh, NC 27602-1151; telephone 919/821-4711; FAX 919/829-1583; e-mail: amajestic@tharringtonsmith.com.

COUNCIL HOLDS ANNUAL PLANNING MEETING

The Council Board of Directors held its annual planning meeting in Charleston, just prior to the advocacy seminar, on October 13th and 14th to focus on Council programming for the 2000-2001 fiscal year.

Here are some highlights of the meeting:

- Council officers Martin Semple (CO), Cindy Kelly (KS) and Margaret Chidester (CA) chaired working groups to update the Council's "Long Range Goals & Strategies" and ensure that they support NSBA's strategic plan. The preliminary work of these working groups will continue by conference call resulting in a draft document to be finalized by the Board at its meeting this spring in Orlando.

- The Membership and State Council Relations Committee, chaired by John Osburn (OR), made recommendations to ensure solid member relations in all state councils, including a leadership training session for state council presidents in Orlando.

- The 2000 Advocacy Seminar Program Committee, chaired by David Farmelo (NY), discussed the format and topics of the 2000 seminar and ways of reaching deeper into the Council membership for talented legal educators, for Council programs as well as the NSBA annual conference and the T+L conference.

- The new Legislative Liaison Committee, chaired by Rudy Moore (AR), and supported by Dan Fuller and Julie Lewis (NSBA), developed strategies for grass roots involvement of Council members in NSBA's advocacy program. One result of this committee's work is a new Legislative Briefing to be held in conjunction with the 2000 School Law Seminar.

- The Urban Law Committee, chaired by Nancy Krent (IL), developed recommendations for a closer collaboration with urban district attorneys and the Council of Urban Boards of Education (CUBE) program.

- The Insurance Committee, chaired by Anthony Scariano (IL), discussed ways that the Council can assist school districts with obtaining high quality E&O insurance.

- The Publications Committee, chaired by Melanie Keeney (MO), developed topics and ideas for future Council publications.

- The State Association Counsel Program Committee chairman, Pat Lacy (VA), reported on his committee's very successful efforts to ensure that program planning for this group meets their unique needs.
- Susan Butler gave the board a preview of the new Council Web site and legal data base that will go "live" in December and will link to NSBA's Resource Exchange Network data base.

IMPORTANT DATES

March 30-April 1, 2000	School Law Seminar, Clarion Plaza Hotel, Orlando, FL
October 12-14, 2000	Advocacy Seminar, Wigwam Resort, Phoenix, AZ
March 22-24, 2001	School Law Seminar, San Diego, CA
April 4-6, 2002	School Law Seminar, New Orleans, LA

James T. Maatsch
Chairman

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